

# In re Interest of Jaydon W. & Ethan W., children under 18 years of age.

**Caselaw No.**

25 Neb. App. 562

**Filed on**

Tuesday, February 20, 2018

**Summary:** Mathew W. appeals the order of the county court of Platte County, sitting as a juvenile court, which denied his motion for custody of his minor children who had been adjudicated under Neb. Rev. Stat. § 43-247(3)(a), as to their mother. Mathew is the father of the two children at issue, born in 2008 and 2009, and the former spouse of their mother, whom he married in 2000 and divorced in 2007. Mathew resided in Columbus, NE until around 2012-13 and attempted to co-parent the children, who also lived there, up until that time. In 2013, the mother obtained a protection order against Mathew, restricting contact with the children. As a result, Mathew moved to Georgia and stopped paying child support.

In August 2013, the children were removed from the mother's care due to a § 43-247(3)(a) adjudication and placed in foster custody. Mathew testified that he made attempts to contact DHHS about the case to no avail. At the expiration of the protection order in June 2014, Mathew moved back to Nebraska and took up residence in Omaha. Between February 2015 and February 2016, Mathew and the mother maintained contact each week and began regular visits and overnight stays at Mathew's residence in Omaha twice per month.

On August 31, 2015, the children were placed back in the mother's home, but were removed again on October 15 due to allegations of physical abuse by Kylee's new husband. Mathew responded by contacting DHHS, asked to be involved in the case, and was granted supervised visits with the children twice per week. In January 2016, Mathew filed a motion for custody with the court, which the State objected due to his recent addition to the case and caseworkers testified that a longer transition period would be preferable. The mother did not object despite the prior protective orders against Mathew. The court denied Mathew's motion but allowed greater visitation privileges.

In May 2016, the children began displaying behaviors serious enough for the court to order suspension of all visitation with both parents and psychological evaluations of all parties. Mathew's evaluation showed several personality traits and behaviors problematic to interactions with and ability to meet the needs of the children, resulting in an HHS recommendation of solo PCIT without the children.

Mathew again filed a motion for custody in April 2017. In the meantime, he had moved to Columbus to be closer to the children, maintained full-time employment, had his own residence, resumed paying child support, and was making attempts to catch up on the arrears. DHHS caseworkers again objected to custody with Mathew, citing the continuation of general improvement in the children's behavior after visitation suspension the previous year. Thus, the court again denied Mathew's request for custody and ordered DHHS to "immediately and as quickly as possible address" the behavioral and counseling issues by way of any necessary assessments. Mathew appeals and assigns that the juvenile court violated his due process rights and erred in denying his motion for custody of the children.

The Court of Appeals analysis first turns to the issue of jurisdiction and whether the county court's order denying Mathew's motion for custody was a final and appealable order in that it affected his substantial right to raise his children. Citing *In re Interest of Octavio B., et al.*, 290 Neb. 589 (2015) and *In re Interest of Cassandra B. & Moira B.*, 290 Neb. 619 (2015), the Court found that the April 2017 motion denial was not a continuation of the January 2016 motion denial. This conclusion was supported by the different factors and considerations presented to the court in each instance as separate from each other, complicated by multiple assessments seeking to remedy issues that are not quickly solved. This, combined with Mathew's inability to control the speed of the assessments, render the county court's order to be final and appealable.

Turning to the merits of Mathew's appeal for denial of his custody motion, the Court notes that the concept of due process relies on a notion of fundamental fairness which is often elusive and requires a weighing of the interests of all involved. The parental preference principle is considered, which holds that a parent has a natural right to custody of their children unless it has been affirmatively shown that a biological or adoptive parent is unfit or affirmatively terminated his or her right to custody. Here, the Court finds allegations of Mathew's lack of fitness to be absent from the State's argument. Therefore, the Court looks at whether the State proved by clear and convincing evidence that Mathew forfeited his right to custody, which the county court concluding that he had in the April 2017 hearing (citing *In re Interest of Lakota Z. & Jacob H.*, 282 Neb. 584 (2011)).

The Court of Appeals states that forfeiture can be proven by a "substantial, continuous, and repeated neglect of a child and a failure to discharge the duties of parental care and protection" that may be established by the "complete indifference of a parent for a child's welfare over a long period of time." This burden of proving parental unfitness rests with the State. Here, the State contends that Mathew's absence from the case during August 2013 to December 2015 as the necessary evidence.

However, the Court notes that Mathew was prohibited from contact until June 2014 under the protective order, made several attempts to contact the State about the removal, and began making contact with the mother and children as early as February 2015. Contact and involvement had been regular since then and Mathew followed all directives and case plan requirements.

The Court finds fault with DHHS's continued focus on the mother rather than both parents during the case, so much so that "significant visitation" was not had between Mathew and his children since May 2016 though "no fault of his own" while DHHS was still trying to get to the bottom of nearly year-old behavioral issues. The Court then concluded that, even though he had been delinquent in child support for a period and the protection order was earned through

his own actions, Mathew's overall behavior and situation was not clearly and convincingly indicative of a forfeiture of parental rights.

Consequently, the Court of Appeals finds that the county court erred in denying the Mathew's second motion for custody, but also concludes that the county court maintains jurisdiction pursuant to the 43-247(3)(a) adjudication against the mother, which necessitates a remand to county court to implement a transition plan to Mathew's custody.

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